United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2132.

717

No. 11, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HENRY C. COBURN.

COMPARATIVE ANALYSIS OF ACTS RELATING TO ADULTERATING, ETC., OF FOOD AND DRUGS.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2132.

No. 11, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HENRY C. COBURN.

Comparative analysis, prepared by the Health Officer of the District of Columbia, of An Act Relating to the adulteration of foods and drugs in the District of Columbia, approved February 17, 1898, 30 Stat., 246, and An Act For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes, approved June 30, 1906, 34 Stat., 768, in so far as relates to local manufacture and commerce in said District.

I. An Act Relating to the adulteration of foods and drugs in the District of Columbia, approved February 17th, 1898. 30 Stat., 246.	II. An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes, approved June 30, 1906. 34 Stat., 768.	
a. Is applicable only in the District of Columbia.	*a.* Is applicable throughout the entire territorial extent of the United States in so far as relates to interstate and foreign commerce, and in so far as its terms expressly provide is applicable to local manufacture and commerce in the District of Columbia and the Territories, the term Territories being defined in the Act so as to include the insular possessions of the United States.	1. Territorial applicability.
a. Applies only to foods *for man*, and drugs, as defined in the Act (Sec. 1 and 2), and does not include articles that enter into the composition of food.	*a.* Applies to foods and drugs, as defined in the Act, *for man and other animals*, (Secs. 1, 2, and 6, and others), and to articles which enter into the composition of food (Sec. 8).	2. Substances to which applicable.

	I. Act of 1898.	II. Act of 1906.
3. Offences.	*a.* Prohibits adulteration only. (Sec. 1.)	*a.* Prohibits *misbranding* as well as adulteration. (Secs. 1, 2, and others.)
	b. Makes it unlawful to sell, exchange, or deliver any food or drug adulterated within the meaning of the Act. (Sec. 1.)	*b.* Makes no reference to *exchange or delivery.* Prohibits, however, the sale of foods or drugs adulterated *or misbranded*, but only as defined by this Act. (Sec. 2.)
	c. Makes it unlawful to have custody or possession of a food or drug adulterated within the meaning of the Act, with intent to sell or exchange it. (Sec. 1.)	*c.* Does not prohibit custody or possession with intent to sell.
	d. Makes it unlawful to expose or offer for sale or exchange a food or drug adulterated within the meaning of the Act. (Sec. 1.)	*d.* Prohibits the offering for sale, but not the exposure, of articles adulterated or misbranded within the meaning of the Act. (Sec. 2.)
	e. Makes it unlawful to refuse to sell to the Health Officer or his representative a sample of a food or drug for analysis. (Sec. 6.)	*e.* Contains no provision requiring the sale or delivery of samples for analysis.
	f. Makes it unlawful to hinder, obstruct, or interfere with any proper officer of the Health Department in the performance of his duty. (Sec. 8.	*f.* Contains no prohibition whatsoever upon hindering, obstructing, or interfering with public officers.
	g. Does not prohibit the manufacture of adulterated foods or drugs.	*g.* Prohibits the *manufacture* of foods or drugs adulterated or misbranded within the meaning of the Act. (Sec. 1.)
4. Definitions.	*a.* Defines "drug" so as to make it include cosmetics. (Sec. 2.)	*a.* Does not define the word "drug" so as to make it include cosmetics. Cosmetics would be included under this Act only to the extent that they might be regarded as substances intended to be used *for the cure, mitigation, or prevention of disease.* (Sec. 6.)
	b. Defines the term "food" to include all articles used for food or drink by man but says nothing as to articles used for food or drink by other animals. As to whether the term "drug" is applicable to remedies used for animals other than man, the statute is silent. (Sec. 2.)	*b.* Defines the term "food" and the term "drug" so as to make them applicable to substances used *by man or other animals.* (Sec. 6.)
	c. Does not define the word "person," nor refer to corporations, companies, societies, or associations.	*c.* Defines "persons" so as to make it include corporations, companies, societies, and associations, and makes them as well as the person actually offending amenable to the penalties of the Act. (Sec. 12.)
5. Standards.	*a.* Fixes standards for adulteration only. (Sec. 3.)	*a.* Fixes certain standards for adulteration (Sec. 7) and prescribes other standards or requirements with respect to misbranding. (Sec. 8.)
	b. Recognizes standards for the purity of drugs fixed by the German, French, or English Pharmacopeias. (Sec. 3.)	*b.* Does not recognize standards fixed by the German, French, or English Pharmacopeias.

I. Act of 1898.	II. Act of 1906.
c. Does not recognize standards fixed by the National Formulary.	*c.* Recognizes standards for the purity of drugs fixed by the National Formulary. (Sec. 7.)
d. Does not in terms define as adulteration the presence of vinous, malt, or spirituous liquors or compounds, or narcotic drugs in candy. An Act to prevent the adulteration of candy in the District of Columbia, approved May 5, 1898, (30 Stat., 398), does, however, prohibit the use in candy of ingredients deleterious or detrimental to health, and this would doubtless cover narcotic drugs, although possibly not vinous, malt, or spirituous liquors or compounds.	*d.* Regards vinous, malt, or spirituous liquors or compounds, and narcotic drugs, when present in confectionery, as being adulterations. (Sec. 7, subhead, confectionery.)
e. Defines food as adulterated "if it is an imitation of or is sold under the name of another article." (Sec. 3; subhead, food; clause, fourth.)	*e.* Does not define as an *adulteration* an article which is an imitation of or is sold under the name of another article, but defines as *misbranding* an article of food "if it be imitation of or offered for sale under the *distinctive* name of another article." (Sec. 8; subhead, food; clause, first.) The word "distinctive" is apparently advisedly used, since in defining the misbranding of drugs the definition reads, "if it be an imitation of or offered for sale under the name of another article" (Sec. 8; subhead, drugs; clause, first); the word "distinctive" does not appear.
f. Prohibits concealing inferiority of food by polishing it, regarding food so polished as adulterated. (Sec. 3; subhead, food; clause, sixth.)	*f.* Makes no reference to the polishing of food to conceal inferiority.
g. Does not define the mixing of food so as to conceal inferiority as adulteration.	*g.* Makes the mixing of food in a manner whereby damage or inferiority are concealed an adulteration within the meaning of the Act. (Sec. 7; subhead, food; clause, fourth.)
h. Does not in terms prohibit the sale of the products of diseased animals or of animals that have died otherwise than by slaughter.	*h.* Defines as adulterated within the meaning of the Act any food that is the product of a diseased animal or one that has died otherwise than by slaughter. (Sec. 7; subhead, food; clause, sixth.)
i. Fixes standards for milk and cream. (Sec. 3; subhead, food; clause, eighth.)	*i.* Fixes no standards for milk and cream.
k. Fixes standards for butter and cheese. (Ibid.; clause, ninth.)	*k.* Fixes no standards for butter and cheese.
l. Fixes a standard for coffee. (Ibid.; clause, tenth.)	*l.* Fixes no standard for coffee.
m. Fixes a standard for lard. (Ibid.; clause, eleventh.)	*m.* Fixes no standard for lard.
n. Fixes a standard for tea. (Ibid.; clause, twelfth.)	*n.* Fixes no standard for tea.
o. Fixes a standard for vinegar. (Ibid.; clause, thirteenth.)	*o.* Fixes no standards for vinegar.

	I. Act of 1898.	II. Act of 1906.
	p. Fixes standards for cider, wines, fruit juices, and malt liquors. (Ibid.; clause, fourteenth.)	*p.* Fixes no standards for cider, wines, fruit juices, and malt liquors.
	q. Fixes a standard for glucose. (Ibid.; clause, fifteenth.)	*q.* Fixes no standard for glucose.
	r. Fixes a standard for flour. (Ibid.; clause, sixteenth.)	*r.* Fixes no standard for flour.
	s. Fixes a standard for bread. (Ibid.; clause, seventeenth.)	*s.* Fixes no standard for bread.
	t. Fixes a standard for olive oil. (Ibid.; clause, eighteenth.)	*t.* Fixes no standard for olive oil.
	u. Does not prohibit misbranding.	*u.* Misbranding, which is prohibited by the Act, is defined to cover statements, designs, or devices, on packages of food and articles that enter into the composition of food, which are false or misleading in any particular. (Sec. 8.) In the case of drugs, if the package fails to bear a statement on the label showing the quantity or proportion of alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation thereof, it is misbranded. (Ibid.; subhead, "drugs"; clause, second.) Likewise food must be similarly labeled, except that the alcohol content need not be stated (Ibid.; subhead, food; clause, second). If a package of food undertakes to state in terms the weight or measure thereof, it must be plainly and correctly stated on the outside of the package, or it is misbranded. (Ibid.; subhead, food; clause, third.)
6. Guarantees.	*a.* Provides for the vendor immunity only with respect to sales of patented medicines, compounded drugs, or mixtures. Does not prohibit the prosecution of the vendor, but requires him, if prosecuted, to produce a written warranty that the article which he sold was of the same nature, substance, and quality *as that demanded of him by the purchaser*, and that he, the vendor, had no reason at the time of sale to believe that it was otherwise. Warrantors need not reside in the United States, and are not made liable criminally for their warranty. (Sec. 3; subhead, drugs; proviso.)	*a.* Provides for the vendor immunity through the production of a guaranty signed by the wholesaler, jobber, manufacturer, or other party *residing in the United States*, to the effect that the article sold was *not adulterated or misbranded within the meaning of the Act*, and makes the guarantor criminally liable for a false guaranty. This Act *prohibits the prosecution of a dealer* if he can establish a guaranty as aforesaid, and, therefore, does not require him to offer his guaranty as a matter of defense in event of prosecution. (Sec. 9.)
7. Special provisions, exceptions, etc.	*a.* Requires that if there be more than one quality of any food or drug known by the same name the best quality thereof shall be furnished the purchaser unless he otherwise requests at the time of making such purchase or unless he be notified at such time of the inferiority of the article delivered. (Sec. 2.)	*a.* Contains no provision requiring the delivery of the best quality of an article.

I. Act of 1898.	II. Act of 1906.	
b. Does not tolerate the use of preventives injurious to health in the preparation of food.	*b.* Tolerates the preparation of food products for shipment when they are preserved *by any external application whatsoever* under certain circumstances. (Sec. 7; subhead, food; clause, fifth.)	
a. Makes it the duty of the Health Officer of the District of Columbia, under the direction of the Commissioners of said District, to adopt such measures as may be necessary to facilitate the enforcement of the Act and to prepare rules and regulations with regard to collecting and examining samples. (Sec. 4.) Makes it the duty of the Health Officer to investigate complaints of violations of its provisions. (Sec. 5.)	*a.* Imposes no duty upon the Health Officer of the District of Columbia. Provides, however, that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or which may be submitted for examination by the Health Officer of said District. (Sec. 3.) Provides further that examinations of specimens to determine whether adulterated or misbranded within the meaning of the Act shall be made in the Bureau of Chemistry of the Department of Agriculture or under the direction and supervision of such Bureau. (Sec. 4.)	8. Administrative provisions.
a. Does not require that a vendor be given a hearing before any administrative officer prior to being prosecuted.	*a.* Requires that a vendor or manufacturer be given a hearing before being prosecuted, at least in those cases to be prosecuted at the instance of the Secretary of Agriculture. (Sec. 4.)	9. Procedure.
b. Does not require publication of the fact and result of prosecution.	*b.* Requires that, after judgment of the Court, notice be given by publication. (Sec. 4.)	
c. Requires a portion of the sample analyzed be reserved for the defendant or his attorney, in event of prosecution. (Sec. 7.)	*c.* Does not require the reservation and delivery of portions of samples.	
d. Provides for prosecutions in the police court of the District of Columbia, on information brought in the name of said District and on its behalf. (Sec. 9.)	*d.* Provides for prosecution in "the proper courts of the United States," by the District Attorney, and makes it the duty of the District Attorney to institute prosecution if the Health Officer of the District of Columbia presents satisfactory evidence of the violation of the law. (Sec. 5.)	
e. Does not provide for the seizure and confiscation of foods and drugs. An Act to prevent the adulteration of candy in the District of Columbia, approved May 5, 1898, 30 Stat., 398, provides, however, that candy adulterated within the meaning of that Act shall be forfeited and destroyed under the direction of the Court.	*c.* Provides for the seizure and confiscation of adulterated and misbranded foods and drugs. (Sec. 10.)	

	I. Act of 1898.	II. Act of 1906.
10. Penalties.	*a.* For the violation of any of its provisions, provides a fine of not less than five dollars nor more than one hundred dollars. (Sec. 9.) There is no provision for imprisonment. An act to prevent the adulteration of candy in the District of Columbia, approved May 5, 1898, 30 Stat., 398, provides a fine of not exceeding one hundred dollars for the manufacture for sale or for knowingly selling or offering for sale candy adulterated within the meaning of the Act.	*a.* For the manufacture of adulterated or misbranded food or drugs within the meaning of the Act, provides penalties as follows: For the first offense, a fine not to exceed five hundred dollars, or imprisonment for one year, or both such fine and imprisonment. For the second and subsequent offense, a fine of not *less* than one thousand dollars, imprisonment for one year, or both such fine and imprisonment. For the selling or offering for sale of foods or drugs adulterated or misbranded within the meaning of the Act, penalties are provided for as follows: For the first offense a fine not exceeding two hundred dollars. For the second and each subsequent offense, a fine not exceeding three hundred dollars, or imprisonment not exceeding one year, or both.
11. Repeal clauses.	*a.* Provides for the repeal of all inconsistent Acts or parts of Acts, excepting, however, An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine, approved August 2nd, 1886, and excepting also An Act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of "filled cheese," approved June 6, 1896. (Sec. 10.)	*a.* Contains no repeal clause whatsoever.

Henry W. Hodges.
to Lurk

IN THE

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APRIL TERM, 1910.

No. 2132.

No. 11, SPECIAL CALENDAR.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HENRY C. COBURN, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD H. THOMAS,
Corporation Counsel, for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

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DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HENRY C. COBURN.

BRIEF FOR PLAINTIFF IN ERROR.

On the twenty-fifth day of August, 1909, the District of Columbia proceeded, by information, against the defendant, Henry C. Coburn, in the police court of the District of Columbia, charging that the said Coburn of the said District did then and there sell and offer for sale a certain adulterated article of food, to wit: process butter, sold under the name of another article, to wit: butter, contrary to and in violation of an act of Congress of February 17, 1898, constituting a law of the District of Columbia.

The cause came on for hearing before the police court, whereupon the defendant, by his counsel, moved to quash said information on the following grounds:

First. That the act of Congress of February 17, 1898, relating to the District of Columbia, was repealed by the act of Congress passed on the 30th day of June, 1906, known as the Pure Food Law.

Second. Because the information does not charge that the defendant sold under the name of butter a product other than butter.

The court ruled as a matter of law that the information failed to allege any offense under the law, because the article sold, viz: process butter, was not and is not an imitation of butter, and that it was not sold under any other name than butter, and sustained the motion to quash on the second ground of said motion and ordered the discharge of the defendant.

The counsel for the District of Columbia excepted to said ruling of the court, which exception was duly noted by the court upon his minutes, and thereupon the District of Columbia, by its counsel, gave notice in open court at the time of said ruling of its intention to apply to the Court of Appeals of the District of Columbia for a writ of error. This writ was granted and the cause is now to be heard thereon.

Assignment of Errors.

1. The police court committed an error in quashing the information.

2. The act of Congress passed February 17, 1898 (30 Statutes, 246, sec. 3), is in force in the District of Columbia in respect to the offense charged.

ARGUMENT.

I.

Webster's International Dictionary thus defines "butter": "1. An oily, unctuous substance obtained from cream or milk by churning." The consumer who purchases butter naturally expects to receive the product commonly known by that name, and does not expect to receive an imitation of that product which has been made tolerable to the senses by renovation through manufacturing processes.

Under the charge in the information that the defendant sold "process butter" under the name of "butter" it seems reasonably clear that the customer would have right of action against the dealer for deceit or on an implied warranty, and it will be seen that the defendant is liable in the police court for such deceit by virtue of the statute.

The process of making renovated or process butter is thus described:

> "This product is also variously termed 'boiled,' 'aerated' and 'sterilized' butter. There are various modifications of the process of manufacture, but the object is to melt up and treat rancid butter in such a manner that for a time at least it is sweet. The following manner of treatment is typical, and shows in the main the necessary steps in carrying out the process, though details of manipulation vary in different localities. The butter is melted in large tanks surrounded with hot-water jackets at a temperature varying from 40° to 45° C. By this means the curd and brine settle to the bottom, whence they are drawn off, while the lighter particles rise to the top in the form of a froth or scum and are removed by skimming. The clear butter fat is then, as a rule,

removed to other jacketed tanks, and, while still in a molten condition, air is blown through it, which removes the disagreeable odors. The melted fat is then churned with an admixture of milk (more often skimmed), till a perfect emulsion is formed, after which it is rapidly chilled by running into ice-cold water, with the result that it becomes granular in form. It is then drained and 'ripened' for some hours, after which it is worked free from excess of milk and water, salted and packed.

"Under some State laws this product, to be legally sold, must conform to rules of labeling as strict as those prescribed for oleomargarine. In other localities it may be sold with impunity. It is not infrequently put on the market as the very choicest creamery butter and sometimes at the same price.

"U. S. Standard Renovated or Process Butter is renovated or process butter containing not more than 16% of water, and at least 82.5% of fat."

Food Inspection and Analysis, by Albert E. Leach, page 438.

The act of February 17, 1898, under which this case was brought, provides:

> "That no person shall, within the District of Columbia, by himself or by his servant or agent, or as the servant or agent of any other person, sell, exchange, or deliver, or have in his custody or possession with the intent to sell or exchange, or expose or offer for sale or exchange, any article of food or drug which has been adulterated within the meaning of this act."

Section 3 provides:

"That an article shall be deemed to be adulterated within the meaning of this act:

* * * * * * *

"In the case of food: First, if any substance or substances have been mixed with it so as to reduce or lower or injuriously affect its quality or strength; second, if an inferior or cheaper substance or substances have been substituted wholly or in part for it; third, if any valuable constituent has been wholly or in part abstracted from it; fourth, if it is an imitation or is sold under the name of another article; fifth, if it consists wholly or in part of a diseased, decomposed, putrid, or rotten animal or vegetable substance, whether manufactured or not; sixth, if it is colored, coated, polished, or powdered whereby damage is concealed, or if it is made to appear better or of greater value than it really is; seventh, if it contains any added poisonous ingredient or any ingredient which may render it injurious to the health of a person consuming it.

* * * * * * *

Provided, That an offense shall not be deemed to be committed under this section in the following cases, that is to say, first, where the order calls for an article of food or drug inferior to such standard, or where such difference is made known by being plainly written or printed on the package; second, where the article of food or drug is mixed with any matter or ingredient not injurious to the health and not intended fraudulently to increase its bulk, weight, or measure or conceal its inferior quality, if at the time such article is delivered to the purchaser it is made known to him that such article of food or drug is so mixed."

* * * * * * *

The word "butter" is not defined in the act and requires no definition to explain its meaning, and therefore the defendant cannot contend for a definition in a trade or technical sense, nor is the plaintiff bound to allege that "butter" has any trade, technical or statutory meaning.

The act is not addressed solely to food which is injurious to health. Inferior, or cheap substances, abstraction of valuable constituents, or imitation or sale under the name of another article, or the making of one article to appear of greater value than it really is, are each and all prohibited by section 3.

"Process butter" is adulterated food within the act. It is an inferior substance to natural butter; it is a cheaper substance; it is an imitation of butter and it was sold under the name of another article, and it is made to appear of greater value than it really is. The offense charged is completely described in the act and it is unnecessary to refer to any other statutory enactment to support the charge.

This statute in reference to drugs was considered in District of Columbia *v.* Lynham, 16 App. D. C., 85, where it was held that it is no defense for a druggist who is prosecuted for selling an adulterated drug, to show simply that he was ignorant of the fact that the drug was adulterated.

In Weigand *v.* District of Columbia this court referred to the statute in the following language:

> "The whole subject of the retail sale and disposition of drugs and articles of food, including milk, has by the act of 1898 been placed under the supervision and regulation of the health department of the District subject to the control of the Commissioners, as a means of protection against adulteration and impurity of the articles offered for sale."
>
> Weigand *v.* District of Columbia, 22 App. D. C., 559, 569.

In District of Columbia *v.* Burns the court declined to take jurisdiction because there had been a final judgment against the District in the police court, but on the question whether the act of 1898 had been repealed by the pure food act of June 30, 1906, the court observed that, "It seems probable that the police court took an erroneous view of the law."

> District of Columbia *v.* Burns, 32 App. D. C., 203, 4, 5.

The record discloses that the court below quashed the information because it held that process butter is not an imitation of butter, or in other words, that the sale of process butter was the sale of butter. It has been shown that this conclusion is incorrect under the plain language of the act of 1898. The court below relied, however, on the definition of the word "butter" in the act of August 2, 1886 (24 Statutes, page 209).

There are at least two reasons why the act of August 2, 1886, does not apply to the case. First, the act of 1898 is a later act and is local in its character and is addressed to the subject of adulteration of foods and drugs.

Second, the act of August 2, 1886, was enacted for the purpose of imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine and is national in character. It is plain that the act of 1898 does not repeal the act of 1886 and that the two acts treat of separate and distinct subjects.

The definition of the word "butter" in the first act is confined to that act in express terms. This definition and purpose appear upon an inspection of sections 1 and 2 of the act of August 2, 1886. These sections read as follows:

> "That *for the purpose of this act* the word 'butter' shall be understood to mean the food product usually known as butter and which is made exclusively from

milk or cream, or both, with or without common salt, and with or without additional coloring matter.

"SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleo-margarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard-oil, vegetable-oil, annotto, and other coloring matter, intestinal fat and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

The definition of the word "butter" in the oleomargarine act of August 2, 1886, was enlarged by the amendment of that act, passed May 9, 1902 (32 Statutes, part 1, 193). Section 4 of that act defines "process or renovated butter." It says:

"That 'process butter' or 'renovated butter' is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified, or refined, and made to resemble genuine butter, always excepting 'adulterated butter' as defined by this act."

Section 5 of said act in part provides:

"All process or renovated butter and the packages containing the same shall be marked with the words, 'Renovated Butter,' or 'Process Butter' and by such other marks, labels and brands, and in such manner

as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory, or to the District of Columbia, or to any foreign country, until it has been marked as provided in this section."

This act, however, does not deal with the sale of said articles in the District of Columbia, but deals with their transportation therein and remaining therein for sale and declares that the same (sec. 1)—

"Shall, upon the arrival within the limits of such State or Territory or the District of Columbia, *be subject to the operation and effect of the laws* of such State or Territory or *the District of Columbia,* enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom, by reason of being introduced therein in original packages or otherwise."

In view of the amendment of the act of 1886 by the act of 1902 it is difficult to see how the definition of butter in the first-named act has any application to the act of 1898.

If any statutory definition applies, that definition is to be found in the act of 1902, wherein "process butter" is defined, and declared, in effect, to be subject to the provisions of the act of 1898, and other laws of the District of Columbia. The reasoning of the judge of the police court, it is submitted, was clearly erroneous.

II.

The act of February 17, 1898, *at least in so far as the offense charged is involved, has not been repealed by the pure food act of June* 30, 1906.

(34 Statutes, 768.)

Under the act of 1898 adulterated articles "in the case of food" embraced a larger list than the class of articles enumerated in the act of 1906.

Section 7 of the act of June 30, 1906, provides, in part:

> "That for the purposes of this act an article shall be deemed to be adulterated: * * * In the case of food:
>
> "First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> "Second. If any substance has been substituted wholly or in part for the article.
>
> "Third. If any valuable constituent of the article has been wholly or in part abstracted.
>
> "Fourth. If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.
>
> "Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed

as applying only when said products are ready for consumption.

"Sixth. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

A comparison of the two acts, in reference to adulterated food, will disclose that the provisions of Class Four in the act of 1898, viz: *"fourth, if it is an imitation of or is sold under the name of another article"* (*the charge in the information*), and the provision of Class Six in the act of 1898, viz: "or if it is made to appear better or of greater value than it really is," are both omitted in the act of 1906.

The provision of section 2 of the act of 1898 will not be found in the pure food act of 1906. The provision is as follows:

"SEC. 2. * * * The term 'food,' as used herein, shall include confectionery, condiments, and all articles used for food or drink by man, and if there be more than one quality of any article of food or drug known by the same name the best quality thereof shall be furnished to the purchaser, unless he otherwise requests at the time of making such purchase, or unless he be notified at such time of the inferior quality of the article delivered."

The act of 1906, moreover, is national and not local in character, and applies principally to the introduction or receipt in or shipment from the District, and the two acts, certainly when not in conflict, can be and ought to be sustained under the principle announced by this court in the Weigand case. In that case, Chief Justice Alvey, speaking for the court, said:

"The act of 1895, however, is only impliedly repealed by the subsequent act of 1898, *so far* as the provisions of the latter act are repugnant to it, *or so far only* as the latter statute, making new provisions, is plainly intended as a substitute for provisions contained in the former act." (The *italics* are in the opinion.)

Weigand *v.* District of Columbia, 22 App. D. C., 569.

One of the cases cited in this opinion is that of Henderson's tobacco, which holds that although a former statute is impliedly repealed by a subsequent one plainly repugnant to it, or so far as the later statute's making new provisions is plainly intended for a substitute for the earlier one, yet a repeal is not to be implied where the powers or directions under the later acts are such as may well subsist together under the earlier, and the language used by this court is an adoption of the words used by the Supreme Court.

Henderson's Tobacco, 11 Wall., 652, 657.

The pure food law of 1906 contains no repealing clause, and there is no presumption that it repeals the act of 1898.

Hartford *v.* U. S., 8 Cranch, 109, 110.
Osborn *v.* Nicholson, 15 Wall., 654.
Ex parte Crow Dog, 109 U. S., 556, 565.
Beals *v.* Hale, 4 How., 38, 53.

"We say by necessary implication, for it is not sufficient to establish that subsequent laws *cover the same or even all the cases provided for it;* for they may be merely affirmative, or *cumulative,* or auxiliary. But there must be a *positive* repugnancy between the provisions of the new law and those of the old; and *even then* the old law is repealed by impli-

cation only, *pro tanto, to the extent of the repugnancy.*"

Justice Story in Wood *v.* U. S., 16 Pet., 342, 362, 363.
Frost *v.* Wenie, 157 U. S., 46, 58.

Perhaps the latest utterance of this court on this subject will be found in United States *v.* Mason, where it is said:

"Repeals by implication are not favored, and it is also true that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, unless there is something else to indicate that the later provision was intended to amend, or exclude the operation of the other."

United States *v.* Mason, 33 App. D. C., 350, 354.

On the whole case the judgment of the police court should be reversed.

Respectfully submitted,

EDWARD H. THOMAS,
Corporation Counsel, for Plaintiff in Error.

Henry W. Hodges
to Lisk.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 11 Special Calendar.

DISTRICT OF COLUMBIA,
Plaintiff in Error,
vs.
HENRY C. COBURN,
Defendant in Error.
} No. 2132.

BRIEF FOR THE DEFENDANT IN ERROR.

WALTER A. JOHNSTON,
Attorney for Defendant in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

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BRIEF FOR THE DEFENDANT IN ERROR.

The motion of the defendant in error upon which the information against him was quashed by the Police Court was based upon two grounds, which said grounds were in fact presented and argued to the Police Court, and are as set forth in the record.

ARGUMENT.

The prosecution is brought and the information is based upon a charge that the defendant sold and offered for sale a certain adulterated article of food, to wit, Process Butter, sold under the name of another article and contrary to the Act of Congress, February 17, 1898. The Act of Congess of February 17, 1898, 30th Statutes at Large, page 236, is an Act entitled an "Act Relating to the Adulteration of Foods and Drugs in the District of Columbia." Section three, Sub-section b of said act, provides in the case of foods: "That an article shall be deemed to be adulterated within the meaning of this act, First, if any substance has been mixed with it so as to reduce or lower or injuriously affect its quality and strength; Second, if an inferior or cheaper substance or substances have been substituted wholly or in part for it. Third, if any constituent of the article has been wholly or in part abstracted from it; Fourth, if it is an imitation of or sold under the name of another article; Ninth, in the case of butter or cheese, if it is not made exclusively from milk or cream or both, with or without salt; the butter, if it contains more than twelve per centum of water, more than five per centum of salt and less than eighty-three per centum of fat"; and said Act further provides as follows: "Provided that an offense shall not be deemed to be committed under this section in the following cases, that is to say, first, where the order calls for an article of food or drug inferior to such standard or where such difference is made known by being plainly written or printed on the package."

The ninth section deals specifically with butter or cheese, and pointedly says that butter or cheese shall be deemed to be adulterated within meaning of this Act when it is not made exclusively from milk or cream or both, with or without common salt, and if the butter contains more than

twelve per centum of water, more than five per centum of salt and less than eighty-three per centum of fat.

There is no charge in the information that the butter sold by the defendant was not made exclusively from milk or cream or both, with or without common salt, or that it contained more than twelve per centum of water, more than five per centum of salt and less than eighty-three per centum of fat. The charge in the information simply is that the defendant sold an adulterated article, adulterated within the meaning of the Act of February 17, 1898, but the Act of February 17, 1898, specifically provides that butter shall be deemed adulterated when it fails in the requirements as set forth in the ninth section of Section 3, Sub-section b, but there is no charge in the information that the butter sold by the defendant failed in any of these requirements. There is nothing in the record to show that the Court below in quashing the information relied upon the definition of butter in the Act of August 2, 1886. It is true that the Act of August 2, 1886, in Section one reads as follows: "That for the purpose of this Act the word butter shall be understood to mean the food product usually known as butter which is made exclusively from milk or cream or both, with or without common salt, and with or without additional coloring matter."

Adulterated butter is defined by Congress in the Act passed May 9, 1902 (32 Statutes at Large, Part 1, page 193), to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform purified or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is

mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water. And Process Butter is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified or refined, and made to resemble genuine butter, always excepting adulterated butter as defined by this Act. Clearly showing that Congress did not intend in that Act to class Process Butter as an adulterated article. II. The Act of February 17, 1898, in relation to the offense charged in the information of this case has been undoubtedly repealed by the Pure Food Act of June 30, 1906 (34 Statutes, 768). The Act of February 17, 1898, is an Act entitled "An Act Pertaining to the Adulteration of Foods and Drugs in the District of Columbia." The Act of June 30, 1906, is an Act for preventing the manufacture, sale, transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors and for regulating traffic therein and for other purposes.

Section 1 of the Act of February 17, 1898, makes it unlawful for any person within the District of Columbia to sell or have in his possession with intent to sell any article of food or drug which is adulterated within the meaning of this Act.

Section two of the Act of June 30, 1906, makes it unlawful to introduce into the District of Columbia or shipment to any foreign country of any adulterated or misbranded article of food, and further provides that it shall be unlawful for any person to receive in the District of Columbia, and having received, to deliver to any other person any article so adulterated or misbranded, and further makes it unlawful for any person to sell or offer for sale

in the District of Columbia any such adulterated or misbranded food or drug. Section 3 of the Act of February 17, 1898, Sub-section b, provides, "That an article shall be deemed adulterated within the meaning of the Act."

First, if any substance or substances have been mixed with it so as to reduce or lower or injuriously affect its quality or strength. Second, if an inferior or cheaper substance or substances have been substituted wholly or in part for it. Third, if any valuable constituent has been wholly or in part abstracted. Fourth, if it is an imitation of or sold under the name of another article.

The Act of June 30, 1906, provides that an article shall be deemed adulterated in the case of food, First, if it be an imitation of or offered for sale under a distinctive name of another article. Second, if it be labeled or branded so as to deceive or mislead the purchaser—or if the contents of the package as originally put up shall have been removed in whole or in part and other contents have been placed in such package—or if it failed to bear a statement on the label of the quantity and proportion of any morphine, opium, cocaine, etc., or any derivative or preparation of any of such substances contained therein.

It will be seen, therefore, that the Act of June 30, 1906, contains and covers the whole subject of the Act of February 17, 1898, with new provisions added, and is, therefore, a repeal of the former Act of February 17, 1898, and as stated by the Court in the case of Fulton vs. District of Columbia (2d Appeals D. C., 438): "It is a well-stated rule of statutory construction that when the later act covers the whole subject of the former one, especially when the later act contains new provisions, this later act will be construed to repeal the former."

A statute covering the whole subject-matter of a former one, adding offenses and varying the procedure, operates not cumulatively, but by way of substitution, and, therefore,

impliedly repeals it. In the absence of any repealing clause, it is, however, necessary to the implication of a repeal that the objects of the two statutes are the same.

United States vs. Claflin, 97 U. S., 546-551-552.
United States vs. Tynan, 11 Wallace, 88.
Gassenheimer vs. District of Columbia, 6th App D. C., 117.
National Bank vs. U. S., 107 U. S., 445.

While repeal by implication is not favored, it is as effective as express repeal, where the latter enactment covers the whole subject-matter of the previous law, and is plainly intended to prescribe the only rule which shall govern. Callon vs. District of Columbia (16th Appeals D. C., 271). As respects the sale of adulterated articles of food, there can be no doubt but what the Act of 1906 was intended as and operated to repeal the Act of February 17, 1898, as respects the offer for sale and sale of adulterated articles of food within the District of Columbia.

The Act of 1906 fully covers all the provisions of the Act of February 17, 1898, with certain additions, and was undoubtedly intended to take the place of and supersede the Act of February 17, 1898, and so it comes within the principle that where two acts, though not in express terms repugnant, yet if the later act covers the whole subject of the first and embraces new provisions, it will operate as an appeal of the former act. Bride vs. McFarland (18th Appeals D. C., 125).

It was not contended in the information that the article sold was not what it purported to be. There is no claim whatever in the information that it was injurious to health or that the article contained poisonous or injurious ingredients. It cannot be successfully claimed that Process But-

ter is an imitation of butter. It is a well-known fact that Process Butter is a purer butter than many so-called creamery butters.

The Act of February 17, 1898, does not define Process Butter or class it as an adulterated butter. The Act of 1892 does define Process Butter, but especially exempts it from the class known as adulterated butter. It could not be contended under the information that the sale of this butter simply as butter was intended to deceive unless it was sold as a creamery butter or an Elgin butter, which are well-known trade butters.

The act of May 9, 1902, fixes the tax on adulterated butter at 10 cents per pound, and on process butter at ¼ of one per cent per pound. Process butter is not classed in the Act of February 17, 1898, or any other Act of Congress as an adulterated article. Nor can it be successfully contended that it is an adulterated article. It is admitted by the appellant in its brief that it is butter that goes through a process, which process it does not claim is in any manner injurious or that any substance is added to it in this process whereby it becomes adulterated.

There can hardly be any contention but that the Act of June 30, 1906, repealed the Act of February 17, 1898, if not in its entirely, certainly as to the sale of adulterated articles of food, where the information is based solely upon the charge that the article sold was adulterated or was an imitation of another article.

It is respectfully submitted that the ruling of the Police Court in this case should be affirmed.

Respectfully submitted,

WALTER A. JOHNSTON,
Attorney for Defendant in Error.